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JUST HOW MUCH DO MEDICINE AND MORALS MIX: CATHOLIC HOSPITALS AND THE POTENTIAL EFFECTS OF THE FREEDOM OF CHOICE ACT

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INTRODUCTION

Before leaving office, President George W. Bush's administration put in place the HHS Refusal Rule (formally titled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law") that essentially states that hospitals risk losing federal funding if they force physicians to perform procedures to which they are morally opposed. In response, there is talk that the Freedom of Choice Act (FOCA) will again be introduced in Congress. Although the bill failed in 2004, President Barack Obama has said that he would sign the bill into law as President if it passes through Congress. FOCA would require all hospitals, including those that are Catholic, to perform abortions and other procedures related to "a woman's freedom to choose to bear a child or terminate a pregnancy."[1]

The passing of FOCA could create unique problems for Catholic hospitals that are responsible for following not only federal law but canon law as well. In 2008, the United States health care system included 624 Catholic hospitals that had handled more than 92 million outpatient visits.[2] Historically, the city of St. Louis has depended primarily on Catholic hospitals. There are eleven Catholic hospitals in the Archdiocese of St. Louis.[3] What will happen in St. Louis, and other similarly situated cities

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1. H.R. 1964, 110th Cong. (2007).

2. *Health Care Reform—Facts & Statistics*, U.S. CONFERENCE OF CATHOLIC BISHOPS, www.usccb.org/healthcare/facts.shtml (last visited Mar. 1, 2011).

3. Rick Moran, *Catholic Hospitals Might Close Their Doors Over FOCA*, AM. THINKER (Mar. 7, 2009), http://www.americanthinker.com/blog/2009/03/catholic_hospitals_might_close.html.

and states, if Catholic hospitals lose their federal funding and are no longer able to operate in light of the provisions of FOCA?

Part I of this Note will explore the history of Catholic hospitals in America and the Catholic view on the obligation to provide health care to those in need. Additionally, this part will explore the laws by which Catholic hospitals are bound, focusing particularly on the provisions set forth by the United States Conference of Bishops in *Ethical and Religious Directives for Catholic Health Care Services.*

In Part II, Section A will examine the history of conscience clauses in the United States. Beginning with the introduction of conscience clauses in response to the landmark decision of *Roe v. Wade* in 1973, conscience clauses have continued to evolve and be a source of great debate. Part II, Section B will then address the specific regulations of President Bush's HHS Refusal Rule.

The final part of the Note, Part III, will examine both the text of H.R. 1964 and the potential effects FOCA would have on Catholic hospitals. Part III, Section A will offer a textual examination of the statute and will conclude by considering the specific problems that would be posed to Catholic hospitals if FOCA were in fact to pass Congress and be signed into law by President Obama. Part III, Section B will investigate the realistic options that Catholic hospitals would have if FOCA were to pass and the unique barriers that Catholic hospitals face to options that society may think obvious. In light of the specific teachings of the Catholic Church, selling Catholic hospitals to secular hospitals willing to perform abortions and other reproductive procedures is not an option. The most likely course of action would be that of civil disobedience. Finally, a look at a recent case involving pharmacist refusal clauses offers a clue as to how courts may rule in the event FOCA were to pass and suit was brought against Catholic hospitals that continued to refuse to provide abortions.

I. CATHOLIC HEALTH CARE IN AMERICA

A. *A Catholic View on the Right to Health Care*

The Catholic Church's commitment to health care comes both from the example of Jesus Christ in Scripture and "the writings and teachings of the Church throughout the centuries."[4] For example, according to the Gospel of Matthew, "Jesus went about in all Galilee, teaching in their synagogues, preaching the gospel of the kingdom, and healing all manner of disease and all

4. JEREMIAH J. MCCARTHY & JUDITH A. CARON, MEDICAL ETHICS: A CATHOLIC GUIDE TO HEALTHCARE DECISIONS 129 (1990).

manner of sickness among the people."[5] The United States Conference of Catholic Bishops notes that "[i]n faithful imitation of Jesus Christ, the Church has served the sick, suffering, and dying in various ways throughout history."[6]

The writings of the Church on the topic of health care are abundant. In general, the Catholic Church considers "service to the sick as an integral part of its mission"[7] and thus has made care of the sick an integral part of its ministry over the history of the Church. In the Charter for Health Care Workers, produced by the Pontifical Council for Pastoral Assistance to Health Care Workers, the administration of health care is described as "a profoundly human and Christian commitment, undertaken and carried out not only as a technical activity but also as one of dedication to and love of neighbor."[8] Health care providers are "guardians and servants of human life."[9] The health care provider is directed to view the patient always in their totality as a person,[10] to be "faithful to the moral law,"[11] and to look to normative ethics,[12] specifically the bioethical teachings of the Magisterium, to determine how one is to act.[13]

Catholic teachings on social justice, including health care for the sick, are rooted in a natural law tradition, which started

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5. *Matthew*, 4:23–24 (New American Standard Version). *See also Matthew* 8:1–3 (New American Standard Version) ("And when he was come down from the mountain, great multitudes followed him. And behold, there came to him a leper and worshipped him, saying, Lord, if thou wilt, thou canst make me clean. And he stretched forth his hand, and touched him, saying, I will; be thou made clean. And straightway his leprosy was cleansed.").

6. U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 5 (4th ed. 2001) [hereinafter DIRECTIVES].

7. PONTIFICAL COUNCIL FOR PASTORAL ASSISTANCE, CHARTER FOR HEALTH CARE WORKERS 22 (1995) [hereinafter CHARTER] (quoting JOHN PAUL II, *Motu Proprio "Dolentium hominum," in* INSEGNAMENTI VIII/1, 475 (1985)).

8. *Id.* at 17.

9. Pope John Paul II, Encyclical Letter, *Evangelium Vitae* ¶ 89 (Mar. 25, 1995) [hereinafter *Evangelium Vitae*], *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

10. CHARTER, supra note 7, at 19. *See also* DIRECTIVES, *supra* note 6, at 20 ("The well-being of the whole person must be taken into account in deciding about any therapeutic intervention or use of technology.").

11. CHARTER, supra note 7, at 24.

12. M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 306 (8th ed. 2008) ("[N]ormative science, such as law or ethics, is concerned with conduct as it ought to take place, determined by norms.").

13. CHARTER, supra note 7, at 24.

with Saint Augustine[14] and Saint Thomas Aquinas.[15] It is Aquinas who has provided "the most systematic explanation of the natural law in the context of reason as well as revelation."[16] Grounded in the teachings of these two men, the Catholic tradition has evolved over hundreds of years, but continues to be based on a natural law theory.

St. Thomas Aquinas defined law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."[17] Aquinas identifies four types of law: the eternal law,[18] divine law,[19] human law,[20] and natural law. Natural law, according to Aquinas, is the way in which each rational creature is able to participate in the eternal law, whereby man is able to discern what is good and what is evil; what one ought and ought not do.[21] Natural law theory, therefore, posits that there are objective, moral norms that we are able to know and therefore follow by means of human law.

Human law is the temporal law that directs man to moral action. Aquinas explains that it is from the general precepts of

14. St. Augustine was a fourth- and fifth-century philosopher and theologian who greatly contributed to Catholic social thought through his political teachings. Augustine taught that it was "the virtue of justice that directs all citizens to the common good of the city (society)." MARY J. MCDONOUGH, CAN A HEALTH CARE MARKET BE MORAL? A CATHOLIC VISION 12 (2007).

15. *Id.*

16. CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW 39 (Ignatius Press 1999) (1993) [hereinafter 50 QUESTIONS].

17. ST. THOMAS AQUINAS, TREATISE ON LAW q. 90, art. 4 (Regnery Publ'g 2001) (1956).

18. Eternal law comes from God and is His concept of things which is not defined by time but is eternal. *Id.* at art. 1. *See also* RICE, 50 QUESTIONS, *supra* note 16, at 50 (noting that "Saint Augustine defines [the eternal law] as 'the reason or the will of God, who commands us to respect the natural order and forbids us to disturb it'" (quoting Pope John Paul II, *Veritatis Splendor*, ¶ 43 (1993)).

19. The divine law is revelation of the eternal law to humankind. The divine law is necessary for four reasons: (1) to direct man how to act properly so that he may obtain his final end of eternal happiness with God; (2) so that man, who is capable of making mistakes, may clearly know what he is and is not to do; (3) to curb and direct interior acts of man, as opposed to the exterior acts which can be perceived and addressed by human law; and (4) because—according to St. Augustine—human law cannot forbid or punish all evil deeds, and thus divine law is necessary to assure that no evil remains unforbidden and unpunished. AQUINAS, *supra* note 17, at q. 91, art. 4.

20. Human law is described by Saint Thomas Aquinas as the temporal law which is derived from the natural law and gives to man a moral particular determination, or clearer direction, in regards to certain matters. *Id.* at q. 91, art. 3.

21. *Id.* at q. 91, art. 2.

natural law that we are able to derive the human law.[22] Human law is intended to both promote the common good and help man reach his ultimate end—happiness with God.[23] Building on Aquinas' structure, the *Catechism of the Catholic Church* has since defined the common good as "the sum total of social conditions which allow social groups and their individual members relatively thorough and ready access to their own fulfillment,"[24] which requires respect for the person,[25] social well-being and development of the group,[26] and peace.[27] The *Catechism* goes on to say that in order to allow for social well-being and development of the group, it is the role of authority within society to "make accessible to each what is needed to lead a truly human life: food, clothing, *health*, work, education and culture, suitable information, the right to establish a family, and so on."[28] Therefore, it is evident that under the natural law tradition of the Catholic Church, health care is a basic right that is to be afforded to all under the human law of our society.

B. *The Role of Catholic Hospitals in America*

At present, there are 624 Catholic hospitals in the United States.[29] In 2009, these 624 hospitals admitted 5.5 million patients, had 16.9 million emergency room visits and more than

22. *See id.* at q. 91, art. 2. Human law is derived from the natural law either by conclusion or determination. Human law results from conclusion where the natural law forbids an action and the human law is a conclusion from the premise (*e.g.* the human law that one must not kill is a conclusion from the natural law premise that one should do no harm to man). On the other hand, human law results from a determination from some certain generality (ex. the law of nature requires that evildoers should be punished, and the human law determines the manner of punishment). *Id.*

23. RICE, 50 QUESTIONS, *supra* note 16, at 61.

24. CATECHISM OF THE CATHOLIC CHURCH § 1906 (1992) [hereinafter CATECHISM] (emphasis added), *available at* http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c2a2.htm.

25. RICE, 50 QUESTIONS, *supra* note 16, at 72 ("In the name of the common good, public authorities are bound to respect the fundamental and inalienable rights of the human person. Society should permit each of its members to fulfill his vocation." (quoting CATECHISM, *supra* note 24, §§ 1905–09)).

26. *Id.* at 73 ("Development is the epitome of all social duties. Certainly, it is the proper function of authority to arbitrate, in the name of the common good, between various particular interests . . . .").

27. *Id.* ("[T]he common good requires *peace*, that is, the stability and security of a just order. It presupposes that authority should ensure by morally acceptable means the security of society and its members.").

28. CATECHISM, *supra* note 24, § 1908 (emphasis added).

29. U.S. CONFERENCE OF CATHOLIC BISHOPS, *supra* note 2.

92.7 million outpatient visits.[30] By size, eleven of the nation's forty largest health care systems are Catholic.[31] The Catholic Health Association reports that as of 2008, 15.8% of all patient admissions were to Catholic hospitals in the United States.[32]

Some parts of the country are more dependant on Catholic hospitals and health care facilities than others. In 1828, four Sisters of Charity founded the first hospital west of the Mississippi in St. Louis.[33] Called the Sisters' Hospital, the hospital was a three-room log house, which was soon replaced by a two-story brick building.[34] Today, there are eleven Catholic hospitals within the Archdiocese of St. Louis.[35] SSM Health Care, the thirty-eighth largest health care system in the United States, runs seven of these hospitals. In addition to the seven hospitals located within St. Louis, SSM runs an additional eight hospitals and two nursing homes throughout Wisconsin, Illinois, Missouri, and Oklahoma.[36] In 2009, SSM Health Care employed 22,000 employees and managed 1,235,985 outpatient visits.[37]

St. John's Mercy Medical Center, sponsored by the Sisters of Mercy Health System, is the second largest hospital in metropolitan St. Louis.[38] Begun in 1871 when the Sisters of Mercy converted a school classroom into a 25-bed infirmary for women and children, the hospital has since grown to a 979-bed hospital, which includes 1,177 physicians, 5,821 other workers, and over

30. *Id.*

31. *Id.* Among the forty largest health care systems in the nation are the following Catholic health care systems by rank, system name, and number of hospitals: 3. Ascension Health, 78; 7. Catholic Health Initiatives, 77; 8. Catholic Healthcare West, 41; 11. Catholic Health East, 40; 12. Providence Health & Services, 27; 13. Trinity Health, 33; 21. Catholic Healthcare Partners, 32; 28. Sisters of Mercy Health System, 20; 34. CHRISTUS Health, 33; 36. Bon Secours Health System, 18; 38. SSM Health Care, 16. *Id.*

32. *Fast Facts,* CATHOLIC HEALTH ASS'N, http://www.chausa.org/Pages/Newsroom/Fast_Facts/ (last visited Mar. 1, 2011). The website notes that the 2008 American Hospital Association (AHA) Annual Survey was used to compile most facts referenced by the CHA, and that the 2008 survey included data from 610 of the 620 Catholic hospitals in the United States.

33. Mother Anne Kathryn Webster, R.S.C.J., The Impact of Catholic Hospitals In St. Louis 1 (1968) (unpublished Ph.D. dissertation, St. Louis University) (on file with the Hesburgh Library, University of Notre Dame).

34. *Id.* at 1–2.

35. Moran, *supra* note 3.

36. *Fast Facts,* SSM HEALTH CARE, http://www.ssmhc.com/internet/home/ssmcorp.nsf/Documents/C47DCA123BC4BEB5862573BB006503DC?OpenDocument (last visited Mar. 1, 2011).

37. *Id.*

38. ST. JOHN'S MERCY, http://www.stjohnsmercy.org/sjmmc/ (last visited Mar. 1, 2011).

600,000 outpatient visits a year.[39] For cities like St. Louis, the detrimental effects that FOCA could have on the continued services of Catholic hospitals are a real concern. Because of the Catholic Church's view on cooperation, the reality is that Catholic hospitals must either find a way to stay open in their current capacities or close—selling the hospitals to secular health care systems that are willing to perform abortions simply is not an option.

C. *Governing Catholic Hospitals*

Catholic hospitals are unique in that they must follow both canon law and civil law in all aspects of their operations. The *Code of Canon Law* clearly provides that all administrators of ecclesiastical goods[40] must "observe the provisions of *canon and civil law* . . . [and] they are to take special care that damages will not be suffered by the Church through the non-observance of the civil law."[41] The *Code of Canon Law* goes on to lay out the specific actions that must be taken before the alienation[42] of ecclesiastical property, if the property is above the maximum value set by the bishops.[43] For the sale of Catholic hospitals, the value of the property will exceed the amounts generally set, and thus before a Catholic hospital can be sold, the consent of the Ordinary[44] and the Holy See himself[45] must be obtained.

While the *Code of Canon Law* provides broad, general regulations, it is the *Ethical and Religious Directives for Catholic Health Care Services* (*Directives*) that provide Catholic hospitals and health care

39. *Facts & Statistics*, ST. JOHN'S MERCY, http://www.stjohnsmercy.org/sjmmc/media/facts.asp (last visited Mar. 1, 2011).

40. "The term 'ecclesiastical property' or 'ecclesiastical temporal goods' refers to the temporal goods that belong to some ecclesiastical moral person, whether that moral person be the Church or the Holy See Itself, a diocese, a religious institution or house, or some other similar moral person." FRANCIS N. KORTH, CANON LAW FOR HOSPITALS 5 (1961).

41. 1983 CODE c.1284, § 2 (Canon Law Soc'y of Am. trans., 1983) (emphasis added).

42. Alienation is defined as "[t]he transfer, sale, or reduction of value of Church property. Ecclesiastical law regulates the alienation and sets down specific conditions under which it is to be done." *Catholic Dictionary: Alienation*, CATHOLIC REFERENCE, http://www.catholicreference.net/index.cfm?id=31731 (last visited Mar. 2, 2011) (quoting FR. JOHN HARDON, MODERN CATHOLIC DICTIONARY (Eternal Life 2000)).

43. 1983 CODE c.1292, §§ 1–3.

44. Ordinary is defined in ecclesiastical law as "a cleric with ordinary jurisdiction in the external forum over a specified territory . . . ." *Catholic Dictionary: Ordinary*, CATHOLIC REFERENCE, http://www.catholicreference.net/index.cfm?id=35302 (last visited Mar. 2, 2011) (quoting HARDON, *supra* note 42).

45. 1983 CODE c.1292, § 2.

facilities with the specific provisions they are to follow in administering care to the sick. The *Directives* state, "Catholic health care services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical and nursing staff, and other personnel."[46] Echoing the *Code of Canon Law*, the *Directives* go on to encourage "[c]ollaboration with other health care providers, *in ways that do not compromise Catholic social and moral teaching*."[47] Therefore, in both the actions of the Catholic health care facility itself and in its dealings with others, the moral teachings of the Catholic Church must at all times be paramount.

In addition, specific directives are given regarding abortion and other procedures related to procreation and connected matters. Concerning abortion, the *Directives* clearly state that it is never permitted and that interference between conception and implantation is to be considered an abortion. The *Directives* mandate that "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation,"[48] thereby prohibiting partnerships between Catholic hospitals and secular hospitals that provide abortions. Furthermore, Catholic hospitals and other health care facilities are prohibited from performing treatments on a mother that can potentially harm the fetus and can be postponed until the unborn child is viable,[49] promoting or condoning contraceptive practices,[50] or providing direct sterilization of men or women, whether permanent or temporary.[51]

From the general teachings of the natural law to the specific directives of the Catholic Church, Catholic hospitals and other health care facilities are clearly limited in the services they are able to provide. The HHS Refusal Rule and FOCA do not ask whether an individual doctor can morally object to certain proce-

46. DIRECTIVES, *supra* note 6, at 10.

47. *Id.* at 10 (emphasis added).

48. *Id.* at 26 ("In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.").

49. *Id.* at 27.

50. *Id.* at 28. The text continues, however, that Catholic health institutions "should provide, for married couples and the medical staff who counsel them, instruction both about the Church's teaching on responsible parenthood and in methods of natural family planning." *Id.*

51. *Id.* Sterilization is only permitted when the "direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." *Id.*

dures, such as abortion, but rather, whether a hospital or health care system as a whole may consciously object to such procedures. If the legislative answer is no, what are Catholic hospitals to do?

II. CONSCIENCE RULES

A. *History of Conscience Clauses in the United States*

The HHS Refusal Rule is another in a long line of legislative conscience clauses that attempt to protect the right of health care providers, both institutions and individuals, who refuse to perform certain procedures based on religious or moral objections in the aftermath of *Roe v. Wade*.[52]

The Church Amendment,[53] so-called because Senator Frank Church (D-Idaho) sponsored it in Congress,[54] was the first federally mandated conscience clause and was passed in 1973, the same year as the decision in *Roe v. Wade*.[55] The Amendment prohibited a public official or authority from conditioning federal funds on the requirement that institutions or individuals perform or assist in the performance of abortions or sterilization procedures that were contrary to the institution's or individual's moral or religious beliefs.[56] Furthermore, institutions could not discriminate against employees who refused to partake in abortions and sterilizations for moral or religious reasons[57] or against applicants for training and study programs because they were unwilling to perform such procedures.[58] Under the Church Amendment, Catholic institutions could not be forced to perform abortions or sterilizations based on their receipt of federal funding.

In 1996, Congress ensured the protection of Catholic medical schools and physicians trained at Catholic medical schools

52. 410 U.S. 113 (1973).

53. Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b), 87 Stat. 95 (codified as amended at 42 U.S.C. § 300a-7 (2006)).

54. *See generally* William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL'Y 455, 552–553 (2001). The amendment was passed in response to the 1973 ruling in *Taylor v. St. Vincent's Hospital*, 369 F. Supp. 948 (D. Mont. 1973), in which the court enjoined a hospital from refusing to allow tubal-ligation sterilization procedures. *Id.*

55. Martha S. Swartz, *"Conscience Clauses" or "Unconscionable Clauses": Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL'Y L. & ETHICS 269, 280 (2006).

56. 42 U.S.C. § 300a-7(b).

57. *Id.* § 300a-7(c)–(d).

58. *Id.* § 300a-7(e).

when it enacted Section 245 of the Public Health Service Act (PHS Act).[59] The PHS Act specified that any state or local government that receives federal assistance may not discriminate against a health care entity who refused to undergo training for abortions, provide such training, or provide referrals for such training or abortions in general.[60] In addition, physicians who had attended medical schools or other training programs that did not provide training in abortions could not be discriminated against[61] and accreditation of such programs could not be based on whether a program provided abortion training.[62]

The Weldon Amendment, signed into law by President Bush on December 8, 2004, was the most recent conscience clause legislation prior to the HHS Refusal Rule.[63] The Weldon Amendment denies federal funds to any federal, state, or local agency, program, or government that "subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."[64] The HHS Refusal Rule, passed in 2008, is the most expansive conscience clause to date.[65]

B. *"HHS Refusal Rule" Under President Bush's Administration*

On December 19, 2008, President Bush's administration passed what has come to be called the "HHS Refusal Rule" but is officially entitled, "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discrimina-

59. Departments of Health and Human Services Appropriations Act of 1996, Pub. L. No. 104-134, § 515, 110 Stat. 1321-221, 1321-245 (codified at 42 U.S.C. § 238n) (creating Public Health Service Act § 245).

60. *Id.* § 238n(a)(1).

61. *Id.* § 238n(a)(3).

62. *Id.* § 238n(b).

63. Consolidated Appropriations Act of 2005, Pub L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004).

64. *Id.*

65. Jane W. Walker, Comment, *The Bush Administration's Midnight Provider Refusal Rule: Upsetting the Emerging Balance in State Pharmacist Refusal Laws*, 46 HOUS. L. REV. 939, 944 (2009) ("In December 2008, the Department of Health and Human Services (HHS) acted to disrupt this emerging consensus and throw state policies into question by promulgating a rule that purports to give all health care providers, including pharmacists, absolute protection from discrimination resulting from their refusal to participate in—or even refer—certain procedures, including abortion and, in certain cases, *any* activity to which the health care provider has a religious objection. Unlike state policies that have emerged over the past decade, the federal policy does not balance the patient's right to access with the provider's religious rights, but instead defers solely to the provider.").

tory Policies or Practices in Violation of Federal Law."[66] Issued by the Department of Health and Human Services (HHS), the HHS Refusal Rule expresses concern "about the development of an environment in sectors of the health care field that is intolerant of individual objections to abortion or other individual religious beliefs or moral convictions" that "may discourage individuals from entering health care professions."[67] The purpose of the HHS Refusal Rule, therefore, is "to protect the right of health care entities . . . , both individuals and institutions, to refuse to perform health care services" to which they have religious or moral objections.[68] In essence, the HHS Refusal Rule set out to accomplish this goal by reinstating various provisions of the Church Amendment, the Public Health Service Act, and the Weldon Amendment.[69]

The HHS Refusal Rule goes on to address various institutions that receive federal funding and makes receipt of such funds conditional upon the institutions refraining from various activities. Catholic hospitals could fall under 45 C.F.R. § 88.3(c), which mandates that any entity receiving federal funds from HHS cannot discriminate against an institution or individual health care provider "on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortion, as part of the federal program for which it receives funding."[70] Therefore, Catholic hospitals that receive funding for certain federal programs within their hospitals, such as Medicaid and Medicare, cannot be discriminated against based on the fact that they refuse to provide abortions. Furthermore, this provision of the HHS Refusal Rule guarantees that Catholic hospitals do not have to refer patients seeking abortions to other hospitals or health care facilities that would be willing to provide them.

Provision 45 C.F.R. § 88.3(f)(1) could also apply to Catholic hospitals as an entity that receives funds under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000. If Catholic hospitals qualify under this provision, physicians and the hospital itself would be protected in "refus[ing] to perform or assist in the performance of a lawful sterilization pro-

66. Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).

67. *Id.* at 78,073.

68. *Id.* at 78,096–97.

69. *Id.* at 78,096.

70. *Id.* at 78,098.

cedure or abortion on the grounds that doing so would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions concerning abortions or sterilization procedures themselves . . . ."[71] The HHS Refusal Rule goes on to say that teaching hospitals which fall within this provision also may not discriminate against or deny admission to an applicant who is unwilling to perform, suggest, counsel, recommend, assist, or in any way participate in an abortion or sterilization procedure because of religious beliefs or moral convictions.[72]

Under the HHS Refusal Rule, therefore, Catholic hospitals, physicians, providers, pharmacists, and medical schools are immune from discrimination based on their refusal to provide certain services. Not only are these members of the health care profession immune from discrimination, but also all health care entities that receive funds from HHS, including state and local governments, are required to certify, in writing, that they will abide by the provisions set forth in the HHS Refusal Rule.[73]

III. POTENTIAL EFFECTS OF THE FREEDOM OF CHOICE ACT

A. *The Freedom of Choice Act*

On March 5, 2009, President Obama's HHS Secretary, Kathleen Sebelius, proposed the rescission of the HHS Refusal Rule.[74] Rescission of the HHS Refusal Rule alone would be unlikely to pose significant problems for Catholic hospitals. While rescinding the HHS Refusal Rule would remove the protection against discrimination, merely removing the HHS Removal Rule would not require affirmative action on the part of Catholic hospitals. The same cannot be said, however, for FOCA.

The history of FOCA began in 1989 when it was first introduced by Representative Don Edwards (D-Cal.) and Senator Alan Cranston (D-Cal.).[75] Concerned that *Roe v. Wade* could poten-

71. *Id.*
72. *Id.*
73. *Id.*
74. Rescission of the Regulation Entitled "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law", 74 Fed. Reg. 10,207 (proposed Mar. 5, 2009), *available at* http://www.thefederal-register.com/d.p/2009-03-10-E9-5067.
75. Tom McClusky, *Focusing on FOCA: 'Freedom of Choice Act' Would Harm Women and Remove Freedoms*, FAM. RES. COUNCIL, http://www.frc.org/insight/focusing-on-foca-freedom-of-choice-act-would-harm-women-and-remove-protections (last visited Mar. 2, 2011).

tially be overturned,[76] this bill attempted to codify the decision in *Roe v. Wade* by proposing that, "a state may not restrict the right of a woman to choose to terminate a pregnancy (1) before fetal viability; or (2) at any time, if such termination is necessary to protect the life or health of the woman."[77] The bill was never enacted, but over the years it has continued to resurface periodically.

The most recent resurfacing came in April of 2007 when Representative Jarrold Nadler (D-N.Y.) introduced a version of FOCA with the express purpose "[t]o protect, consistent with Roe v. Wade, a woman's freedom to choose to bear a child or terminate a pregnancy, and for other purposes."[78] This version stated that "a government may not deny or interfere with a woman's right to choose to bear child; to terminate a pregnancy prior to viability; or to terminate a pregnancy after viability where termination is necessary to protect the life or health of the woman." Furthermore, the government would be prohibited from discriminating against these rights in regulating benefits, facilities, services, or information.[79] In offering support for the bill, Congress emphasized that our country was founded on such principles as liberty, personal privacy, and equality, and concluded that decisions regarding pregnancy—the decision to become pregnant, continue the pregnancy, or terminate the pregnancy—are some of the most private and difficult a woman can make.[80] The bill argues that the right to obtain an abortion is necessary in order to protect a woman's health, and thus the decision in *Roe v. Wade* must be upheld.[81] The Congressional findings conclude that "[t]o guarantee the protections of Roe v. Wade, Federal legislation is necessary."[82]

Although this most recent version of FOCA also failed to pass, there has been continued talk of it again being brought to Congress. This talk increased after then-Senator Obama, in a statement released January 22, 2008, the 35th anniversary of *Roe v. Wade*, addressed "women's fundamental right to choose" and declared, "I will continue to defend this right by passing the Free-

76. *See* Peggy S. McClard, *The Freedom of Choice Act: Will the Constitution Allow It?*, 30 HOUS. L. REV. 2041, 2054 (1994).

77. *See* S. 1912, 101st Cong. (1989); H.R. 3700, 101st Cong. (1989).

78. H.R. 1964, 110th Cong. (2007).

79. *Id.* § 4(b)(1)(a)-(d).

80. *Id.* § 2(1)-(2).

81. *Id.* § 2(5) (suggesting that prior to *Roe v. Wade* an estimated 1.2 million women resorted to illegal abortions, resulting in the death of thousands of women due to the risks associated with such illegal abortions).

82. *Id.* § 2(12).

dom of Choice Act as president."[83] Assuming that FOCA is in fact passed by President Obama, or by any administration in the future, a key issue becomes the effects such action would have on the viability of Catholic Hospitals.

B. *Potential Effects on Catholic Hospitals*

It is fair to say that no one knows what exactly would happen to Catholic Hospitals if FOCA were to become law. Immediately following President Obama's election and increased discussion that FOCA would be passed, many came out proclaiming that Catholic hospitals would be forced to close. On November 11, 2008, exactly one week after Barack Obama was elected the 44th President of the United States, the U.S. Conference of Catholic Bishops met in Baltimore and took a strong stance against the prospect of abortion rights being expanded by FOCA. Bishop Daniel Conlon of Steubenville, Ohio, said, "This is not a matter of political compromise or a matter of finding some way of common ground. It's a matter of absolutes."[84] Francis Cardinal George, president of the Conference, said that FOCA "would threaten Catholic health care institutions and Catholic Charities,"[85] while Bishop Thomas Paprocki, the then-auxiliary bishop of Chicago, declared, "If Catholic hospitals were required by federal law to perform abortions, we'd have to close our hospitals."[86] The president of the Catholic League, the nation's largest Catholic civil rights organization,[87] reiterated that FOCA would force the closure of all Catholic hospitals in the United States.[88]

In the weeks and months following, however, many others came out to refute this view and to argue that while FOCA poses a grave concern, it will *not* ultimately result in the closure of

83. Senator Barack Obama, Statement on the 35th Anniversary of *Roe v. Wade* Decision (Jan. 22, 2008), *available at* http://www.barackobama.com/2008/01/22/obama_statement_on_35th_annive.php.

84. Manya A. Brachear, *Bishops to Challenge Obama on Abortion*, CHI. TRIB., Nov. 12, 2008, § 1 (News), at 12.

85. John L. Allen, Jr., *USCCB: No Retreat on Abortion, But No New Communion Ban*, NAT'L CATHOLIC REP. (Nov. 11, 2008, 16:11 EST), http://www.cfnews.org/Allen-USCCB-Nov08-1.htm.

86. Brachear, *supra* note 84.

87. *About Us*, CATHOLIC LEAGUE, www.catholicleague.org/about.php (last visited Mar. 2, 2011).

88. Penny Starr, *Faith-Based Hospitals Could Close if Obama Signs Freedom of Choice Act*, CNSNEWS (Nov. 26, 2008), http://www.cnsnews.com/news/article/40006 (quoting Bill Donohue, president of Catholic League, as saying, "In practical terms, this (FOCA) would mean the closure of every Catholic hospital in the nation. No bishop is going to stand by and allow the federal government to dictate what medical procedures must be performed in Catholic hospitals.").

Catholic hospitals. Because the sale of Catholic hospitals to secular health care organizations is not an option, the most likely situation under which Catholic hospitals would be able to remain in operation is by simply refusing to follow any federal mandate.

1. Why Catholic Hospitals Cannot Sell

While Catholic hospitals may have options to continue operating in the event FOCA was to pass, selling to a secular health system is not one of them. The fact is, under Catholic teaching, selling a Catholic-run or -sponsored hospital to a secular health care system willing to perform abortions would constitute cooperation. Says Bishop Paprocki, "It would not be sufficient to withdraw our sponsorship or to sell them to someone who would perform abortions. That would be a morally unacceptable cooperation in evil."[89]

Prohibition of cooperation in evil has been a longstanding teaching of the Catholic Church. Saint Alphonsus, an eighteenth-century lawyer and priest,[90] first developed the theory of cooperation in terms of formal and material cooperation.[91] St. Alphonsus defined these types of cooperation as follows: "That [cooperation] is formal which concurs in the bad will of the other and cannot be without sin; that [cooperation] indeed is material which concurs only in the bad action of another, outside the intention of the cooperator."[92] In essence, therefore, formal cooperation occurs when one directly participates in the evil act, whereas material cooperation occurs when the act of the cooperator is not itself wrong, but contributes to another committing a sin.[93]

A key difference between formal cooperation and material cooperation, furthermore, is that one may never cooperate formally in evil, but there are circumstances under which one is permitted to cooperate materially in an evil.[94] It is generally understood that there are three conditions that must be met in order to justify material cooperation in an evil: (1) the action

89. Allen, *supra* note 85.

90. *Catholic Encyclopedia: St. Alphonsus Liguori*, NEW ADVENT, http://www.newadvent.org/ cathen/01334a.htm (last visited Mar. 2, 2011).

91. Joseph Boyle, *Collaboration and Integrity: How to Think Clearly About Moral Problems of Cooperation, in* ISSUES FOR A CATHOLIC BIOETHIC 187, 190 (Luke Gormally ed., 1999).

92. *Id.* at 191 (quoting ST. ALPHONSUS LIGOURI, THEOLOGIA MORALIS 357 (L. Guade ed., 1910)).

93. CHARLES E. RICE, THE WINNING SIDE: QUESTIONS ON LIVING THE CULTURE OF LIFE 229 (1999) [hereinafter THE WINNING SIDE].

94. *Id.*

that produces the side effect must be morally permissible; (2) there must be a morally good reason for performing the action that produces the evil side effect; and (3) the reason must be proportional to the gravity of the evil and the proximity of the action to the immoral act itself.[95] For example, voters are not permitted to vote for a pro-abortion candidate, unless they are presented solely with candidates that are pro-abortion, in which case they are permitted to vote for a candidate in an attempt to help prevent the election of the other candidate whose pro-abortion stance is more extreme.[96]

What exactly it means for there to be Catholic "sponsorship" of a hospital is not as clear as one might imagine.[97] Despite the variations in specific definitions, Catholic sponsorship of hospitals generally refers to the relationship that exists between the church entity and the apostolate—lay members of the religion who operate under the formal religious organization. In regards to this relationship, sponsorship includes both the affiliation of the religious organization to the hospital that is visible to the public and the more formal element of canonical control that is associated with such a relationship.[98] Where there is Catholic

95. Boyle, *supra* note 91, at 197 (describing that these three accepted conditions date back to the original theory which was professed by St. Alphonsus and quoting him as saying, "But the latter [material cooperation] is licit when the action is good or indifferent in itself, and when one has a reason for doing it that is both just and proportioned to the gravity of the other's sin and to the closeness of the assistance given for carrying out the sin.").

96. RICE, THE WINNING SIDE, *supra* note 93, at 229–231.

97. *See* DANIEL C. CONLIN, CANONICAL AND CIVIL LEGAL ISSUES SURROUNDING THE ALIENATION OF CATHOLIC HEALTH CARE FACILITIES IN THE UNITED STATES 124–151 (2000). Conlin discusses the confusion surrounding the various meanings of sponsorship and the difficulties that arise "because sponsorship is neither a canonical nor a civil legal term." *Id.* at 124.

98. *Id.* (offering various definitions and their interpretations or sponsorship from which the general understanding can be gleaned). Conlin gives perhaps the earliest definition of sponsorship, which came from the Sisters of Mercy of the Union, and reads: "Sponsorship consists of the support of, influence on, and responsibility for a project, program, or institution which furthers the goals of the sponsoring group . . . . Sponsorship further implies that the sponsoring group is publicly identified with the project, program, or institution and makes certain resources available to them." *Id.* at 128, n.360 (quoting Sr. Mary Concilia Moran, *Sponsorship: The Uneasy Question*, HOSP. Progress, Oct. 1978, at 52). Conlin then offers a definition adopted fifteen years later by the Catholic Health Association of the United States, which addresses the more formal, canonical aspects of the sponsorship relationship. The CHA definition reads,

> Sponsorship is a term that refers to the canonical relationship a church entity (usually a religious congregation) has toward an incorporated apostolate. Sponsorship is a reservation of canonical control by the religious community that founded and/or sustains an incorpo-

sponsorship, the institution that is sponsored must follow the *Ethical and Religious Directives for Catholic Health Care Services* in its administration of health care.[99]

Bishop Paprocki's comments reflect the fact that if a Catholic hospital were sold to a secular health care system that would then provide abortions and other services forbidden by Catholic teaching, such a sale would constitute material cooperation in an evil. Removing Catholic sponsorship in order to allow secular administration of the hospitals would have the same effect. Neither action represents formal cooperation because the Catholic health care system is not directly participating in the abortions. But there *is* material cooperation because although the act of selling the hospital to the secular health care system is not a sin in and of itself, such as sale would contribute to the ability of the secular hospitals to perform the sinful acts.

Over the past few years, however, Catholic hospitals have been sold to not-for-profit health care systems.[100] Catholic hospitals have been able to do this without facing issues of material cooperation by adding provisions to the sales agreements that require the secular health care systems to abide by Catholic teachings for a period of time.[101] The case has been the same when Catholic hospitals merge with secular hospitals.[102] Such options, however, would no longer be available in the event that FOCA were to be signed into law. The secular hospitals that purchased or merged with Catholic hospitals would be bound by FOCA in the same way as Catholic hospitals and, therefore, for

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> rated apostolate which remains canonically a part of the church entity. This retention of control need not be such as to create civil law liability on the part of the congregation for corporate acts or omissions, but should be enough for the canonical stewards of the sponsoring religious congregation to meet their canonical obligations of faith and administration regarding the activities of the incorporated apostolate.

Id. at 129–130, n.363 (quoting Margaret Mary Modde, *The Search for Identity: Canonical Sponsorship of Catholic Health Care*, CATHOLIC HEALTH ASS'N (St. Louis, Mo.), 1993, at 81).

99. SUSAN BERKE FOGEL, FIGHTING RELIGIOUS HEALTH RESTRICTIONS: PREVENTING THE CONTINUATION OF RESTRICTIONS WHEN RELIGIOUS HOSPITALS ARE SOLD 4 (Merger Watch Project, Emerging Issues Briefing Paper Series, 2004), http://www.mergerwatch.org/pdfs/bp_for_profits.pdf.

100. *Id.* at 3 (documenting the various sales of Catholic hospitals to secular, for-profit systems in 2002 and 2003).

101. *Id.* at 1 (noting that the terms of the provision requiring that Catholic teachings continue to be followed can last from twenty years to forever, and are binding on subsequent owners).

102. *See* Rob Boston, *Bad Medicine: When Catholic and Non-Catholic Hospitals Merge, Women's Health Care Services Often Get Excommunicated*, CHURCH & ST., June 1, 1999, at 9.

the same reason Catholic hospitals would be looking to sell, the secular hospitals would be unable to abide by Catholic teachings as prescribed in the sales agreements. Where Catholic organizations and administrators would be unable to ensure that the hospitals would refrain from providing abortions post-sale, such sales would constitute material cooperation with abortions. Such sales would be forbidden unless justifiable by virtue of meeting the requirements previously addressed. Considering, however, the strong comments made by various bishops that the sale of the hospitals would not be permitted, it seems likely that Catholic hospitals would close rather than sell.

In light of the fact that Catholic hospitals would be unable to sell due to the ban on material cooperation in evil, one must consider whether there are any circumstances under which Catholic hospitals could continue to operate if FOCA were to pass.

2. "Civil Disobedience"

Contrary to the comments by Cardinal George and Bishop Paprocki,[103] it has been asserted by some that if FOCA were to pass, Catholic hospitals would exercise civil disobedience and continue operating in their current capacity. Bishop Robert Lynch of St. Petersburg, Florida, vehemently maintained that if FOCA or similar legislation were to pass, "we will not comply even if our actions constitute civil disobedience. . . . Even in the worst case scenario, Catholic hospitals will not close. We won't comply, but we will not close."[104] President and CEO of Catholic Health Association, Sister Carol Keehan, offered a similar sentiment when she declared, "If FOCA passes, the concept of being pro-choice will not be incompatible with our position—our choice would be not to participate."[105]

The Catholic principle corresponding with civil disobedience is the teaching that one has no duty to follow an unjust law. In fact, certain laws are so unjust that they mandate disobedience. According to the teachings of St. Thomas Aquinas, just laws have the power to bind the conscience of man, but unjust

103. *See supra* Part III.B.

104. Bishop Robert Lynch, *Board (Not Bored) Retreat*, FOR HIS FRIENDS (Feb. 6, 2009, 11:12 AM), http://blogs.dosp.org/bishoplynch/2009/02/06/board-not-bored-retreat/.

105. Moran, *supra* note 3. *See also* Nancy Frazier O'Brien, *Rumors Aside, FOCA Legislation No Threat to Catholic Health Care*, CATHOLIC NEWS SERVICE (Jan. 27, 2009), http://www.catholicnews.com/data/stories/cns/0900402.htm (describing how Sister Keehan cited segregation as "a very timely example" of a law that was once supported but was eventually repealed by the use of civil disobedience).

laws do not. A law can be unjust in one of two ways—it is against human good, or it is against divine good.[106]

First, a law is against human good if it has a bad purpose, is beyond the power of the lawmaker, or unequally burdens the community.[107] Relying upon the teaching of St. Augustine,[108] St. Thomas says that such violations of human good "are acts of violence rather than laws."[109] Where there are such laws, man has no obligation to follow these unjust laws except insofar as to avoid scandal or further disturbance.[110]

Secondly, a law is unjust if it is opposed to the divine good. A law is opposed to the divine good if it would compel one to act contrary to the divine law (i.e. a law that compels idolatry).[111] Unlike laws that are opposed to human good, laws that are opposed to the divine good *must* be disobeyed at all costs.[112]

The Catholic Church has long viewed abortion laws to be unjust in that they are against the most basic and fundamental right from which all other rights are derived—the right to life.[113] Because the Catholic Church views life as beginning at the moment of conception, abortion is considered the killing of an innocent human being, and therefore a law requiring a physician to perform an abortion would not only be opposed to the common good,[114] but would also be opposed to the divine good.[115] Pope John Paul II declared that "a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law,"[116] and therefore an obligation is imposed to oppose them by conscientious objection.[117]

As a civil law that would require medical providers to perform abortions, FOCA falls within the Catholic definition of an unjust law. While FOCA violates the human good in various

106. AQUINAS, *supra* note 17, at q. 96, art. 4.

107. *Id.*

108. *Id.* (citing SAINT AURELII AUGUSTINE, DE LIBRO ARBITRIO VOLUNTATIS i. 5 (Dietz Press 1947)).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Evangelium Vitae, supra* note 9, ¶ 72.

114. *Id.* "Laws which authorize and promote abortion and euthanasia are therefore radically opposed not only to the good of the individual but also to the common good; as such they are completely lacking in authentic juridical validity." *Id.*

115. RICE, 50 QUESTIONS, *supra* note 16, at 86.

116. *Evangelium Vitae, supra* note 9, ¶ 72.

117. *Id.* ¶ 73.

ways,[118] it is unnecessary to look at such violations since FOCA also violates the divine good, and any law against the divine good is also against the human good.[119] As a violation of the human good, there is no duty to follow FOCA. More importantly, however, its status as a law violating the divine good imposes a duty upon the Church to disobey the provisions of FOCA in administering health care through their Catholic hospitals.

While it is clear that FOCA is an unjust law and that Catholic hospitals could only continue to operate while opposing the law, what is unclear is how courts may ultimately handle such a situation. Some insight may be gleaned, however, by looking at how courts have addressed similar situations involving Pharmacist Refusal Rights.

3. Judicial Approach to Pharmacist Refusal Clauses Offer a Clue

The case law involving pharmacist refusal clauses offers an opportunity to analyze the ways in which the courts have chosen to address both individual pharmacists and institutional pharmacies that refuse to provide certain services. One would assume that a similar analysis might be adopted if FOCA were to pass into law and suit was brought against Catholic hospitals. While the evidence is by no means conclusive, if the courts apply the same standard to hospitals as they have to pharmacies, Catholic hospitals will face an uphill battle.

In general, the courts have been more willing to grant protection of one's conscious refusal when grounded in religion and not simply professional ethics.[120] Yet where the one seeking protection is an institution rather than an individual, courts have been less willing to protect refusals based on religious grounds.[121] If FOCA were to pass and the courts were to apply

118. *See* John M. DeJak, *The Nature of Law and FOCA*, CATHOLIC CULTURE, http://www.catholicculture.org/culture/library/view.cfm?recnum=8 694 (last visited Mar. 2, 2011) (suggesting that FOCA fails the definition of law as it is not an "ordinance of reason," and, furthermore, it violates the human good in the following ways: unjust as to purpose; contrary to the natural law and therefore not within the competence of lawmakers to legislate such material; and applies unequally to various members of the community).

119. *Id.*

120. Swartz, *supra* note 55, at 302 ("[C]ourts have tended to be . . . more sympathetic to refusals based on moral or religious beliefs than those based on professional ethical principles or public policy.").

121. *See* Martha Swartz, *Health Care Providers' Rights to Refuse to Provide Treatment on the Basis of Moral or Religious Beliefs*, 19 HEALTH LAW. 25, 27 (2006) (noting that although legislatures have been more willing to provide protection for conscious objections based on religious or moral beliefs, the courts have

the same analysis as that adopted by the United States Court of Appeals for the Ninth Circuit in the recent case *Stormans, Inc. v. Selecky*, Catholic hospitals will likely find themselves legally bound by FOCA.[122]

Handed down in October 2009,[123] the *Stormans* opinion represents the most recent and one of the most authoritative decisions on conscience clauses to date. The case addresses two rules adopted by the state of Washington on April 12, 2007.[124] The first rule applies to individual pharmacists and mandates that the pharmacist must refrain from destroying or refusing to return unfilled lawful prescriptions, violating a patient's privacy, and discriminating against or harassing any patient.[125] The rule does not, however, prohibit a pharmacist from refusing to fill a prescription (such as one for birth control or an emergency contraceptive) based on a personal objection.[126] The second rule applies to institutional pharmacies and requires them "to deliver lawfully prescribed drugs or devices to patients . . . in a timely manner consistent with reasonable expectations for filling the prescription."[127] Although the rule allows for a select set of exceptions under which the lawful prescription can be denied, none of these include the personal objection of the pharmacy owner.

Stormans, Inc. is a pharmacy that brought suit, along with pharmacists Rhonda Melser and Margo Thelen, alleging that the Washington rules violate various rights, more specifically their right to freely exercise their religion under the Free Exercise Clause.[128] While the District Court found for Stormans and granted a preliminary injunction on the enforcement of the rules, the Court of Appeals concluded that the District Court erred in applying a strict scrutiny standard to the Washington rules that, as valid and neutral laws, should be subjected to the lesser rational basis review standard. What is relevant to the possible application to FOCA is the means by which the Court determined the rule was valid and neutral. If FOCA is also deemed

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been less likely to offer such protection, especially to institutions); Swartz, *supra* note 55, at 298 (stating that the courts have been more willing to offer protection to individual health care providers than to institutions, and the protection given to individuals is more likely when their refusals have applied to reproductive services).

122. Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009).
123. *Id.*
124. *Id.* at 1115–16.
125. WASH. ADMIN. CODE § 246-863-095 (2007).
126. *Id.*
127. WASH. ADMIN. CODE § 246-869-010 (2007).
128. *Stormans*, 586 F.3d at 1116–17, 1127–37.

valid and neutral, Catholic hospitals will have a tough time resisting its enforcement.

Addressing the free exercise challenge made by the appellees, the Court of Appeals stated at the outset the long held opinion that "[t]he right to freely exercise one's religion . . . 'does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."'"[129] The Court went on to address the public policy concerns that support this statement.[130] It emphasized that in previous decisions it has always held that while courts cannot interfere with religious beliefs and opinions, they do have the power to interfere with the practices of those corresponding beliefs and opinions.[131] Therefore, a neutral law of general applicability will not be subject to the more demanding strict scrutiny review.[132]

Whether or not a law is neutral is determined by looking at the object of the law, for "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."[133] Following the analysis employed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court in *Stormans* considered both the text and the operation of the Washington

129. *Id.* at 1127 (quoting Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (internal citations omitted)).

130. *Id.* at 1128. The Court addressed the concern of creating a situation in which the law of religion would be superior to the law of the land. Citing the Supreme Court's decision in Cantwell v. Conn., 310 U.S. 296 (1940), the Court of Appeals clarified that while *Cantwell* established that the Free Exercise Clause embraces both the freedom to believe and the freedom to act, it is only the first of these two that is an absolute right. *Stormans*, 586 F.3d at 1128.

131. *Stormans*. 586 F.3d at 1128. The Court quoted *Reynolds v. United States*, 98 U.S. 145, 166 (1878), as establishing that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." *Id. See also Smith*, 494 U.S. 872; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

132. *Stormans*, 586 F.3d at 1127. The Court relied on both *Smith* and *Lukumi* to show the case law in support of this conclusion. In *Smith*, "[a]lthough the Court confirmed that the government may not regulate religious beliefs, it stated that it has 'never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.'" *Id.* at 1129 (quoting *Smith*, 494 U.S. at 878–79). Furthermore, "[i]n *Lukumi*, the Court reiterated 'the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.'" *Id.* at 1129–30 (quoting *Lukumi*, 508 U.S. at 531).

133. *Id.* at 1129 (quoting *Lukumi*, 508 U.S. at 533) (internal citations omitted).

rules in determining whether they were neutral. The standard regarding facial neutrality is whether or not a law "refers to a religious practice without a secular meaning" in the text of the statute.[134] Applied to the Washington ordinances, the rules were found to be facially neutral because they do not reference any religious practice, conduct, or motivation.[135] Furthermore, the laws were neutral with respect to their operation because "[t]hey do not suppress, target, or single out the practice of any religion because of religious content."[136] The Court emphasized that the object of the Washington codes is to ensure that patients have safe and timely access to legal prescriptions, and the refusal to return or fill such prescriptions, depending on the applicable rule, constitutes a violation whether it is motivated by religion or some other objection.[137] The fact that the rules may disproportionately apply to pharmacists or pharmacies carrying out religious objections does not destroy the neutrality of the law.[138]

In addition to being neutral, however, a law must also be generally applicable in order to escape strict scrutiny review. The Court of Appeals determined that it is not the means/ends test that should be applied in determining general applicability[139] but the underinclusiveness analysis employed by *Lukumi* that asks whether "the government 'in a selective manner[,] impose[s] burdens only on conduct motivated by religious belief,'"[140] thereby being underinclusive. The Court concluded that because the Washington codes apply to pharmacists and pharmacies both with and without religious objections "to the same extent—no more and no less," they are not substantially underinclusive and therefore are generally applicable.[141]

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134. *Id.* at 1130 (quoting *Lukumi*, 508 U.S. at 533).

135. *Id.*

136. *Id.* at 1131.

137. *Id.*

138. *Id. See also* Am. Life League, Inc. v. Reno, 47 F.3d 642, 654 (4th Cir. 1995) (finding that the Freedom of Access to Clinic Entrance Act, which punishes actions that are intended to injure, intimidate, or interfere with persons trying to obtain reproductive services and was enacted in response to antiabortion protests, was not in violation of the Free Exercise clause because the Act "punishe[d] conduct for the harm it causes, not because the conduct is religiously motivated").

139. The means/ends test examines whether the means and the ends match each other; "if the means fail to match the ends, the statute likely targets religious conduct and is therefore not generally applicable." *Stormans*, 586 F.3d at 1134 (quoting Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1260 (W.D. Wash. 2007)).

140. *Id.* at 1134 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993)).

141. *Id.*

As neutral and generally applicable laws, the Washington codes were subject to rational basis review and would be upheld so long as they were "rationally related to a legitimate governmental purpose."[142] Because the appellees failed to negate every conceivable basis supporting the rules, the Court found that the rules were rationally related to Washington's interest in ensuring that citizens have their lawful prescriptions filled in a safe and timely manner. In regards to FOCA, therefore, the question becomes whether FOCA is neutral and generally applicable, and if so, whether FOCA is rationally related to the government's interest in ensuring that all women receive safe and timely access to all lawful reproductive procedures.

4. The *Stormans* Standard Applied to FOCA

Assuming a version of FOCA similar to H.R. 1964[143] were to become valid law and suit was brought against a Catholic hospital for refusing to provide abortions, the analysis established in *Stormans* can be applied to help glean insight into how a court would rule on a free exercise challenge. The public policy discussion in *Stormans* that emphasized that the courts, though unable to interfere with religious beliefs and opinions, are entitled to interfere with the practices of those corresponding beliefs and opinions, would similarly apply to probably any form of FOCA passed.[144] The issue, therefore, is whether FOCA is a neutral law of general applicability such that it would be subject to rational review rather than strict scrutiny review.

In order to determine neutrality, we must first determine the object of FOCA[145] by considering both the text and operation of the statute. Like the Washington codes, which were determined to be facially neutral because they did not reference any religious practice, conduct or motivation,[146] the text of FOCA is completely void of any reference to religious practice, conduct or motivation in relation to its application.[147] The text of FOCA simply establishes that a government may not interfere with the right of a woman to bear a child or terminate a pregnancy under certain circumstances and may not "discriminate against the exercise of [those rights] in the regulation or provi-

142. *Id.* at 1137.

143. H.R. 1964, 110th Cong. (2007).

144. *See supra* notes 129–32 and accompanying text.

145. To analyze FOCA, I will use H.R. 1964, with the assumption that any authorized version of FOCA will have the same object and structure.

146. *See supra* note 135 and accompanying text.

147. H.R. 1964, § 4.

sion of benefits, facilities, services, or information."[148] In addition, FOCA is neutral in its operation because the law prevents the government from supporting any institution that does not uphold a woman's right to legally obtain an abortion, regardless of the institution's reason for doing so. Just as the Court in *Stormans* established, the fact that FOCA may apply disproportionately to Catholic hospitals refusing to perform abortions on religious grounds does not destroy the neutrality of the law.[149]

In addition to finding FOCA neutral, it is likely that the Court would find FOCA to be generally applicable by applying the underinclusiveness analysis employed by *Lukumi* and formally adopted in *Stormans*.[150] If it turned out that Catholic hospitals were the only institutions denied government funds in the application of FOCA, the Catholic hospitals could make an argument that FOCA was underinclusive because the government was selectively imposing a burden only on conduct motivated by a religious belief.[151] Such an argument, however, would likely fail. In the same way the *Stormans* Court found that the Washington codes were generally applicable because they applied to the same extent to pharmacists and pharmacies with and without religious objections, FOCA equally applies to all institutions receiving federal funds—whether they be Catholic hospitals objecting on religious grounds or private, sectarian hospitals that refuse to provide abortions on some other grounds.

If FOCA were to become valid law, it appears that the courts would find it to be neutral and generally applicable, and, as such, subject to the rational review standard. In the likely event that those opposing FOCA were unable to negate every conceivable basis supporting the law, it seems safe to assume that the courts would find that FOCA is rationally related to the government's interest in "protect[ing], consistent with Roe v. Wade, a woman's freedom to choose to bear a child or terminate a pregnancy, and for other purposes."[152]

IV. CONCLUSION

It is undeniable that Catholic hospitals play a pivotal role in the administration of health care in America. The requirement that they follow both federal law and canon law can, however, create conflicting obligations. If FOCA were to pass, Catholic

148. *Id.* § 4(b)(2).
149. *See supra* note 139 and accompanying text.
150. *See supra* note 140 and accompanying text.
151. *See supra* note 140 and accompanying text.
152. H.R. 1964 (introductory statement of purpose of FOCA).

hospitals would be required under federal law to provide abortions and other reproductive services in direct conflict with Catholic teachings. At the same time, because the Catholic Church would view FOCA as an unjust law operating against human good and divine good, Catholic hospitals would also have a moral obligation under church teachings to disobey the provisions of FOCA.

Unable to sell because of their inability to cooperate in an evil act, Catholic hospitals would likely engage in civil disobedience. And yet, such tactics would only work for so long. Suits would be brought and courts would almost certainly uphold FOCA as a valid and neutral law that is generally applicable. Despite what many would like to believe, FOCA poses a very real and imminent threat to the existence of Catholic hospitals. And the effect least talked about and yet most important is not what effect such closing would have on the Church itself, but what effect it would have on the 92 million patients that Catholic hospitals treat annually. The effects of FOCA passing and Catholic hospitals closing would be much more than a victory for the pro-choice advocates; it would be a loss to every person who has ever received treatment at a Catholic hospital and to all those who would be denied such services in the future. Perhaps we should take a cue from the medical profession itself and remember above all else: first, do no harm.